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Supreme Court of the United States

OCTOBER TERM, 1993

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., *et al.*,

Appellants,

v.

NED R. McWHERTER, Governor of Tennessee, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

REPLY BRIEF

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ARGUMENT

In attempting to summarily dismiss the issues presented in RWTAAAC Appellants' Jurisdictional Statement as insubstantial, Appellees cite no relevant cases and offer no analysis as to why voting age population ("VAP") should constitute the appropriate basis for determining the representative fairness of a remedial redistricting plan. Appellees' Motion to Dismiss or Affirm has failed to address the substance of the Jurisdictional Statement, lacks serious merit, and should be denied. The Court should note probable jurisdiction over the issues presented herein.

I.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

As demonstrated in RWTAAAC's Jurisdictional Statement, this appeal presents issues of critical importance to the interpretation and enforcement of the Voting Rights Act. The three-judge district court below erred in applying the basis used to determine whether effective majority-minority districts can be drawn to meet a plaintiff's threshold liability burden of proof (VAP) with the basis used to determine whether there is fair minority representation in a representative body (total population). *See Thornburg* v. *Gingles*, 478 U.S. 30, 50 & n.17 (1986) (first prong of threshold factors). The court then erroneously used proportional representation, based on VAP, as an inflexible cap on the remedy for discriminatory vote dilution. These rulings have resulted in the court's failure to order a full and complete remedy for the violations that it found, two majority-minority districts, rather than one district, depriving African-Americans in rural west Tennessee of the *opportunity* to participate equally in the political process and elect representatives of their choice.

A. The Decision of the Three-Judge Court Conflicts With the Decisions of this Court and other Federal Courts.

This Court has held that total population is the proper basis for determining the representative fairness of redistricting plans.[1] Decisions of the lower courts are to the same effect. Plaintiffs' J.S. at 10. Rather than arguing this contention, or citing cases consistent with the ruling of the district court, Appellees merely assert that the district court cases cited did not directly address the issue. Defendants' Motion at 11. This response fails to address the substance of Plaintiffs' J.S. and lacks merit.

The decision of the three-judge court fundamentally conflicts with the analysis and holding in *Garza* v. *County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). Despite the fact that the vote dilution principle in Section 2 derives from the one-person, one-vote reapportionment case of *Reynolds* v. *Sims*, the district court here erroneously dismissed as irrelevant that line of caselaw, misreading *Beer* v. *United States*, 425 U.S. 130, 142 n.14 (1976), a Section 5 case. In *Garza* both the majority and dissent rely on the analysis in *Reynolds* v. *Sims* and its progeny in discussing the issue whether total population or VAP forms the correct basis for reapportionment. Reasoning from *Reynolds* v. *Sims*, the Garza Court held that:

> people, including those who are ineligible to vote, form the *basis* of representative government. Thus population

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1. *See, e.g., Thornburg* v. *Gingles*, 478 U.S. at 74 n.35, 77; *United Jewish Organizations, Inc.* v. *Carey*, 430 U.S. 144, 166 (1977); *Beer* v. *United States*, 425 U.S. 130, 137 (1976); *Whitcomb* v. *Chavis*, 403 U.S. 124, 149 (1971); *see also* Plaintiffs' J.S. at 10-11.

> is an appropriate basis for state legislative reapportionment.

918 F.2d at 774 (emphasis added).

The three-judge court below selected VAP as the basis for measuring representative fairness without reference to *Reynolds* v. *Sims* and its progeny. This finding conflicts with Voting Rights Act and one-person, one-vote cases which focus on equalizing total population as a means of ensuring representative fairness. Without doubt, this conflict presents a substantial issue for review by this Court and forms the basis for reversal of the lower court ruling.

B. The Three-Judge Court Below Erroneously Relied on the Term "Electorate" in Applying VAP as the Numerical Basis for Determining Representative Fairness.

Appellees did not attempt, and cannot, show that courts have consistently utilized VAP as the basis for determining representative fairness in redistricting plans.[2] Appellees' response to the contention that the three-judge court erred in

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2. Appellees cite *Burns* v. *Richardson*, 384 U.S. 73, 91-92 (1966), for the proposition that the Equal Protection Clause seems to permit states to use a basis other than total population in constructing electoral districts. Defendants' Motion at 10 n.6. The *Burns* opinion, however, is narrowly drafted to address the constitutionality of an interim redistricting plan. Of all the possible reapportionment bases mentioned in the case, VAP was never considered as an option. Further, *Burns* has no relevance to this case. The Tennessee Constitution mandates that state legislative districts be drawn on the basis of total population. Tennessee Const. art. 2 § 4. A consistent basis must be used for both reapportionment and in determining the representative fairness of the state's redistricting plan. Plaintiffs' J.S. at 18-19.

interpreting "electorate" as VAP and then applying VAP as the basis for determining representative fairness is merely to restate the findings of the lower court.[3] Defendants Motion at 10. In arguing a literalist approach to statutory interpretation, Appellees apparently miss the point that the word electorate has a more restrictive meaning than voting age population, undercutting the merit of the court's reliance on the definition of the word in interpreting Section 2.

The definition of the word electorate does not control the interpretation of Section 2. As Appellants have noted, electorate is more properly defined as registered voters, actual voters or even the district itself, as opposed to voting age population. Plaintiffs' J.S. at 13. The arbitrariness of the district court's decision to equate the word electorate with VAP is illustrated by the one-person, one-vote cases, from which the vote dilution principle derives, and the legislative history of the 1982 amendment of Section 2. *Id.* at 14. The phrase "one-person, one-vote" has been consistently interpreted and applied as a requirement that electoral districts have roughly equal populations — not equal numbers of registered voters or VAP. *See, e.g., Reynolds* v. *Sims*, 377 U.S. 533, 560-61 (1964). This Court has noted that:

> *Reynolds* v. *Sims*, of course, dealt with more than the statistical niceties involved in equalizing individual voting strength. *** More fundamentally, Reynolds recognized that "the achieving of fair and effective representation

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3. Appellees fail to address the contention that the three-judge court erred in relying on cases applying the VAP standard in the first prong of the *Gingles* threshold conditions to remedy. Again, Appellees merely repeat the court's findings. Defendants' Motion at 10. As Appellants have noted, VAP is relevant for the specific purpose of determining the "electoral potential" of a minority community. Plaintiffs' J.S. at 12.

> for all citizens is . . . the basic aim of legislative apportionment," and it was for that reason that the decision insisted on substantial equality of populations among districts.

Gaffney v. *Cummings*, 412 U.S. 735, 748 (1973) (citation omitted). Applying a restrictive definition of Section 2 would reduce the protection of minority voting rights and be totally at odds with the remedial purpose of the Voting Rights Act. *See South Carolina* v. *Katzenbach*, 383 U.S. 301, 315 (1966).

C. Appellees Maximization Argument Misapprehends the Focus of the Voting Rights Act.

RWTAAAC Appellants have a right to a full remedy for the discriminatory vote dilution found by the district court. Plaintiffs' J.S. at 17-18. Appellees' maximization argument is a strawman set up to cloud the remedy issues in this case. By failing to focus on the Voting Rights Act's protection of equality of *opportunity*, as opposed to proportional electoral *result*, both Appellees and the three-judge court erroneously link the concept of full remedy for vote dilution with the idea of maximizing minority electoral result. Defendants' Motion at 12.

As Appellants have noted, Section 2 protects the equal opportunity to participate in the political process and to elect representatives of choice. Plaintiffs' J.S. at 17. The Section 2 proportionality disclaimer rejects "a right to have *members of a protected class* elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973 (emphasis added). Appellees' maximization argument is grounded on the text of the proportionality disclaimer. Defendants' Motion at 12. The disclaimer does not limit the opportunity to elect as a remedial issue. Plaintiffs' J.S. at 16-17. Appellants have never argued for the right to elect African-Americans in proportion to their total population, but rather seek the

opportunity to elect representatives of their choice, as protected by the Voting Rights Act.[4] Full remedy for vote dilution, not maximizing electoral result, is the issue in this case. Drawing majority-minority districts levels the political playing field but does not guarantee a particular result.

The three-judge court erroneously relied on similar maximization reasoning to impose an inflexible cap on Appellants' remedy for discriminatory vote dilution under the State Senate redistricting plan. As Appellants have argued, the court erred in applying this inflexible remedy limitation and in failing to order the full and complete remedy for vote dilution required by Section 2, where one was available. Plaintiffs' J.S. at 15-16. This error should be addressed on appeal to ensure that flexibility guides the exercise of federal remedial powers, allowing the full remedy for judicially-determined vote dilution.

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4. The distinction between the concepts of protection of "equal opportunity" and "proportional electoral result" is significant. Appellees' link between maximization and full remedy for discriminatory vote dilution assumes that the candidate of choice in the resulting majority-minority district will always be minority. Such an assumption is both erroneous and socio-politically problematical.

II.

THE QUESTIONS PRESENTED ARE FUNDAMENTAL TO THE INTERPRETATION OF THE VOTING RIGHTS ACT AND, THEREFORE, ARE NOT PRETERMITTED BY THE LIABILITY APPEAL

The question whether total population, as opposed to voting age population, is the correct basis for determining the representative fairness of remedial redistricting plans is fundamental to Section 2. At issue here is the manner in which the concepts of representative equality and electoral equality impact on the remedy for judicially-determined vote dilution under the Voting Rights Act. *See, e.g., Garza* v. *County of Los Angeles*, 918 F.2d at 773-76. Regardless of whether a statewide or regional[5] focus is dictated by the cases under submission, the resolution of the questions presented will have an impact on this and subsequent cases and will give guidance to representative bodies charged with the responsibility of reapportionment.

Appellees have grounded the liability appeal on the hope of a favorable change in law following this Court's decision in *Johnson* v. *De Grandy*, No. 92-519 (and related cases). As argued in the Plaintiffs' Motion to Dismiss or Affirm the appeal of the liability findings, no matter how the statewide

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5. Appellees' regional analysis is a transparent attempt to manipulate the reapportionment data. Appellees tout a regional analysis but, in reality, fail to make a regional comparison. Statewide, rather than regional data, forms the basis for their comparisons. The number of majority African-American State Senate seats in southwestern Tennessee is compared to the total number of seats statewide and the region's total African-American population is compared to the state's total population. Defendants' Motion at 7.

percentages issue in *De Grandy* may be decided, that case is factually and fundamentally distinguishable from the instant case. *Id.* at 8.

Appellees have gone to great lengths to mischaracterize RWTAAAC's claims, particularly those below, in an attempt to make this case resemble those under submission. Appellants, however, challenged the entire State Senate redistricting plan and presented substantial evidence of vote dilution and African-American voter cohesion outside southwestern Tennessee. Plaintiffs' J.S. at 3-6. Appellants proposed compact districts in southwestern Tennessee because that was where the districts could be drawn.[6] The liability findings of the court below do not conflict with the decisions of other lower courts. Plaintiffs' Motion at 9-10. Appellees' liability appeal is based upon a prospective change in law. Notwithstanding the merits of the cases under submission, this case will continue to present substantial questions for review.

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6. Appellees' compactness objection to the proposed State Senate districts is groundless. Appellants' proposed rural senate district includes parts of five counties and is 86 miles in length, compared to the districts adopted by the state that includes eight counties and stretches 120 miles. Plaintiffs' Motion at 16.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction in this action and set the case for argument.

Respectfully submitted,

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